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In the Supreme Court of the United States

OCTOBER TERM, 1936

Nos. 422, 423

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

FRIEDMAN-HARRY MARKS CLOTHING COMPANY, INC.

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

The Solicitor General, on behalf of the National Labor Relations Board, prays that writs of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Second Circuit, entered in the above cause on July 20, 1936 (R. 578), denying petitions by the National Labor Relations Board for the enforcement of its cease and desist orders against the Friedman-Harry Marks Clothing Company, Inc., made pursuant to the National Labor Relations Act.

OPINIONS BELOW

The findings of fact and orders of the National Labor Relations Board (R. 375–412, 527–564) and the opinion of the Circuit Court of Appeals (R. 576) have not yet been reported.

JURISDICTION

The judgments of the Circuit Court of Appeals for the Second Circuit was entered July 20, 1936 (R. 578). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, and Section 10 (e) of the National Labor Relations Act.

QUESTIONS PRESENTED

1. Whether, as applied to this company, the National Labor Relations Act is a valid exercise of the power of Congress to regulate commerce among the States and with foreign nations.

2. Whether the provisions of the National Labor Relations Act here involved violate Article III of the Constitution in that they delegate judicial powers to the National Labor Relations Board.

3. Whether the provisions of the National Labor Relations Act here involved violate the First Amendment to the Constitution in that they improperly abridge respondent's freedom of speech.

4. Whether the provisions of the National Labor Relations Act here involved violate the Fifth Amendment to the Constitution in that they deprive respondent of liberty or property without due process of law.

5. Whether the provisions of the National Labor Relations Act here involved violate the Seventh Amendment to the Constitution in that they improperly deprive respondent of the right of trial by jury.

STATUTE INVOLVED

The National Labor Relations Act is printed as an Appendix to the petition for certiorari in *National Labor Relations Board* v. *Jones & Laughlin Steel Corporation,* No. ——, filed herewith, to which the Court is respectfully referred.

STATEMENT

On September 28, 1935, and November 11, 1935, written charges against respondent, the Friedman-Harry Marks Clothing Company, Inc., were filed with the Regional Director for the Fifth Region of the National Labor Relations Board, pursuant to Section 10 (b) of the National Labor Relations Act (printed in Appendix of petition for certiorari in No. 419, p. 25) (R. 11–14, 424–425). The charges were filed by the Amalgamated Clothing Workers of America, and alleged that respondent had engaged in, and was continuing to engage in unfair labor practices within the meaning of the Act.

On October 26, 1935, and November 19, 1935, pursuant to Section 10 (b) of the Act, the Regional Director issued and served upon respondent complaints and notices of hearings (R. 15–23, 426–431). These complaints alleged unfair labor practices affecting commerce within the meaning of subsections (1), (3) and (4) of Section 8, and subsections (6) and (7) of Section 2, and fixed November 6 and December 5, 1935, for a hearing before an examiner (R. 22, 430). An objection was filed in answer to each complaint, urging the lack

of jurisdiction of the Board over respondent and, without waiving its rights under its special appearances, denying the allegations of violation (R. 25–32, 431–439). On December 5, 1935, a hearing was held before a trial examiner, respecting both complaints, in Richmond, Virginia. Respondent, contesting the jurisdiction of the Board and the constitutionality of the Act, participated and presented evidence only in respect to the nature of its business operations.

On March 28, 1936, the Board handed down its decisions setting forth its findings of fact (R. 379–409, 530–562) and the orders here in question (R. 409–412, 562–564). These findings of fact may be summarized as follows:

Respondent is a Virginia corporation engaged in the manufacture, sale, and distribution of men's clothing, with its principal office and plant at Richmond, Virginia (R. 396). Its volume of business in 1932 was $800,000; in 1933, $1,000,000; in 1934, $1,500,000; and the first ten months of 1935, $1,750,000. In the same years its employees totalled, respectively, 550, 625, 675, and 800. (R. 398–399.)

The principal materials used by respondent in the manufacture of its finished products are woolen and worsted goods. Over 99 per cent of such materials used by respondent come from States other than Virginia, and 75 per cent are purchased pursuant to contracts made in New York City. The

materials so purchased and used by respondent are fabricated mainly in Massachusetts, Connecticut, New York, Rhode Island, New Jersey, and Pennsylvania. Immediately after purchase, the woolen goods are shipped to New York City, where they are sponged and then transshipped to the Richmond plant. Other materials, such as linings, thread, and sewing materials, are also purchased and shipped to the Richmond plant almost exclusively from without the State of Virginia. (R. 397–398.)

Over 80 per cent of all finished garments made at the Virginia plant are sold and shipped to customers, mainly department and men's clothing stores, located outside the State of Virginia. To facilitate sales, respondent maintains a sales office and show room in New York City where 15 to 20 per cent of all sales are made. It employs eight traveling salesmen, who operate in many States, and advertises in certain trade publications. It has a registered trade mark, "Rockingham", for use in interstate commerce. (R. 398–399.)

Respondent's plant is typical of the industry. The ultimate market for its products is, of course, nation-wide. In 21 States, however, no men's clothing is produced (R. 385), and 95 per cent of the establishments in the industry are located in eight States (R. 382). Furthermore, only one of those eight States is among the five in New England which in 1929 produced 65 per cent of suiting

fabrics and 74 per cent of overcoating fabrics (R. 384). The major portion of the industry, as well as respondent, depends upon the uninterrupted flow of interstate commerce (R. 387).

The employees found to have been discriminated against were engaged in production operations at the Richmond plant (R. 402–406, 554–558). Each of them belonged to the local union of the Amalgamated Clothing Workers of America, an inclusive labor organization of the industrial type (R. 389–390). It was the activity of these employees in connection with this organization which caused the discrimination against them. (R. 402–405.)

In conclusion, the Board found that interference by employers in the industry with the activities of their employees in joining and assisting labor organizations and their refusal to accept the procedure of collective bargaining leads to strikes and other labor disputes which burden and obstruct the free flow of commerce (R. 406, 561).

On the basis of these findings the Board decided, as a matter of law, that respondent was engaged in unfair labor practices affecting commerce within the terms of Section 8, subsections (1), (3), and (4), and Section 2, subsections (6) and (7) of the Act (R. 409, 562). It therefore issued an order requiring respondent to cease and desist from discharges, threats of discharge, and other practices tending to interfere with or restrain the organization of its employees, and ordering respondent to

offer reinstatement with back pay to the employees found to have been discharged or laid off in violation of the Act, and to post notices stating that it would comply with the order (R. 409–412, 562–564).

On March 28, 1936, the Board filed in the court below its petitions for enforcement of the orders it had entered (R. 1–7, 413–419). By leave of court the two petitions were consolidated (R. 565–567). On July 20, 1936, the court below entered its judgments denying the petitions of the Board for the reason that the order transcended the power of Congress under the commerce clause of the Constitution. The court did not pass upon the other constitutional objections urged by respondent.

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

(1) In holding that the order of the Board herein was not one authorized to be made under the authority of Congress.

(2) In construing the Board's order in this case as being directed merely to respondent's production operations and production employees, rather than to the protection of respondent's interstate commerce against direct and substantial burdens brought about by industrial strife among any or all of respondent's employees, as well as others.

(3) In holding that the Act as applied herein is not an appropriate exercise of the power and responsibility of Congress under the commerce clause

of the Constitution to protect interstate commerce from burdens and obstructions from whatever source.

(4) In holding in effect that the particular origin of industrial strife characterizes the nature of the resulting burden or obstruction upon interstate commerce, and in not judging the nature of such burden or obstruction, in its relation to interstate commerce, from the character and potentialities of the strife itself.

(5) In holding that the decisions of this Court in *Carter* v. *Carter Coal Co.*, Nos. 636 and 651, October Term, 1935, decided May 18, 1936, and *A. L. A. Schechter Corp.* v. *United States*, 295 U. S. 495, involving the Bituminous Coal Conservation Act of 1935, and the National Industrial Recovery Act, respectively, were conclusive as to the non-applicability of the National Labor Relations Act under the facts of this case.

(6) In failing to hold that the Act is not in contravention of the Fifth Amendment or any other provision of the Constitution.

(7) In denying the petitions of the National Labor Relations Board.

REASONS FOR GRANTING THE WRIT

This case presents issues similar to those involved in *National Labor Relations Board* v. *Jones & Laughlin Steel Company*, No. 419, present term, in which a petition for a writ of certiorari has been filed herewith. In each case the appli-

cation of the National Labor Relations Act to the particular respondent has been held to be beyond the power of Congress under the commerce clause of the Constitution—a decision of vital public interest. The Court is, therefore, respectfully referred to pages 10 to 14 of the petition in the *Jones & Laughlin* case for a statement of the reasons why the Government believes that a writ of certiorari should issue in these cases.

Wherefore, it is respectfully submitted that this petition for writs of certiorari should be granted.

STANLEY REED,
Solicitor General.

CHARLES FAHY,
General Counsel,
National Labor Relations Board.

SEPTEMBER 1936.

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